

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Carriage of the Transmissions)	CS Docket No. 98-120
of Digital Television Broadcast Stations)	
)	
Amendments to Part 76)	
of the Commission's Rules)	

COMMENTS OF MARANATHA BROADCASTING COMPANY, INC.

Maranatha Broadcasting Company, Inc. ("MBC"), licensee of independent UHF television station WFMZ-TV, Allentown, Pennsylvania, through counsel and pursuant to Section 1.415 of the Rules, hereby submits these comments concerning the FCC's *Notice of Proposed Rule Making*, FCC 98-153, released July 10, 1998 (the "*NPRM*"), concerning the carriage of digital television broadcast signals by cable television systems.

MBC has a direct, immediate interest in the outcome of this rulemaking proceeding. It has filed an application (File No. BPCDT-980339KG) with the FCC for authorization to commence digital television broadcasting pursuant to the *Fifth Report and Order* and *Sixth Report and Order* in the FCC's proceeding (MM Docket No. 87-268) to adopt transmission standards for digital television broadcasting and a table of digital television channel allotments. Subject to receipt of FCC authorization, delivery and installation of the necessary equipment for WFMZ-DT will be completed before year's end.

WFMZ-DT will operate in the Philadelphia television market, as WFMZ-TV operates in the Philadelphia market. MBC's experience in securing carriage of WFMZ-TV's signal on cable television systems in the Philadelphia market provides an excellent background for measuring the importance of cable television carriage for the development of DTV service in all communities -- not only the largest cities -- and the necessity of an efficient system of regulation to assure that cable operators do not use the cable

bottleneck to stifle the development of digital broadcast television services that would compete with the cable industry's own programming and advertising services.¹

Because of the FCC's must-carry rules, a majority of cable homes in the Philadelphia market have access to WFMZ-TV's schedule of local, first-run and off-network entertainment and non-entertainment programming, including 38 live local newscasts a week. Recent data showed that 77 percent of all TV homes in the Philadelphia DMA subscribed to cable television. Currently, the market includes 1,976,000 cable television homes. (Source: *Nielsen Station Index* (1998).) Because few cable subscribers maintain A/B switch connections, and few of those subscribers actually use the A/B switch, television stations are effectively denied access to cable households, and cable subscribers are denied access to off-air signals, unless the stations are carried by the cable operator.

WFMZ-TV is carried on cable systems with an aggregate of 1,166,997 subscribers (including some systems that fall out of the Philadelphia ADI). Since WFMZ-TV completed a major power increase in November 1993, and Congress amended the copyright law in 1994 to permit cable operators to carry all television stations licensed to communities in the same ADI without incurring liability for additional copyright licensing fees, MBC has assiduously pursued a program of seeking carriage on every cable television system in the Philadelphia ADI where WFMZ-TV is able to deliver a good quality signal.

The FCC should never underestimate the importance of must-carry. While the *NPRM* asserts (§ 33) that some eighty percent of television stations elected retransmission consent during the 1993-1996 election period, WFMZ-TV and other independent television stations, overwhelmingly, have been forced

¹ "Even in communities with two or more cable systems, in the typical case each system has a local monopoly over its subscribers. . . . Cable operators thus exercise 'control over most (if not all) of the television programming that is channeled into the subscriber's home . . . [and] can thus silence the voice of competing speakers with a mere flick of the switch.'" *Turner Broadcasting System, Inc. v. FCC*, No. 95-992, decided March 31, 1997 ("*Turner II*"), *slip op.* p. 12 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 656 (1994) ("*Turner I*")).

to rely on enforcement of must-carry rights to gain access to cable subscribers.² Through litigation to enforce WFMZ-TV's must-carry rights under Section 614 of the Communications Act and Section 76.56 of the Rules, MBC has secured carriage for WFMZ-TV on cable systems with 229,333 subscribers. In addition, the FCC has ordered -- more than 16 months ago -- carriage of WFMZ-TV on cable systems operated by Suburban Cable, Inc. ("Suburban"), and Comcast Cablevision, Inc. ("Comcast"), with 482,222 subscribers in the Pennsylvania and New Jersey suburbs of Philadelphia where carriage has yet to commence because the cable operators, in violation of the FCC's orders, the Communications Act and the FCC's rules, have refused to carry WFMZ-TV pending action on their petitions for reconsideration.

It is no exaggeration, therefore, that the viability of WFMZ-TV is totally dependent on its ability to obtain carriage on cable systems. Unfortunately, that viability, even with must-carry rules, is often hostage to the anti-competitive impulses of cable operators, many of whom resist compliance with the statute and the rules, even to the point of ignoring the FCC's orders.³

Congress's imposition of must-carry obligations on cable television systems is clearly and unambiguously aimed at cable operators' anti-competitive decisions to delete, reposition, or refuse to carry broadcast stations. ("[A]bsent the reimposition of [must-carry], additional local broadcast signals will be deleted, repositioned, or not carried." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (the "Cable Act"), § 2(a)(15).)

² In some instances, the assertion of must-carry rights has made it possible to reach retransmission consent agreements.

³ Because cable operators have denied WFMZ-TV access to significant portions of the Philadelphia market, even in the face of FCC decisions ordering carriage of WFMZ-TV, the station operates at a substantial disadvantage vis a vis other stations in the market in acquiring programming. WFMZ-TV is available off-air or via cable in a sufficient portion of the Philadelphia market -- including the City of Philadelphia -- that program distributors and syndicators regard it as a Philadelphia station and in most instances will not license programming to WFMZ-TV that has been sold to other Philadelphia stations. WFMZ-TV, therefore, must bid against the other Philadelphia market stations for a very limited supply of quality off-network and first-run programming (that has not been licensed nationally to one of the cable networks) without having access to a substantial portion of the cable households in the Philadelphia suburbs.

The stations that are most endangered in the absence of must-carry are independent and UHF stations. Independent local broadcasters (such as WFMZ-TV), the Supreme Court observed, were most likely to be discriminated against, because such stations “tend to be the closest substitutes for cable programs, because their programming tends to be similar . . . , and because both primarily target the same type of advertiser: those interested in cheaper (and more frequent) ad spots than are typically available on network affiliates.” *Turner II*, slip op., p. 14.

The Supreme Court also noted that “cable operators had increasing incentives to drop local broadcasters in favor of cable programmers,” *Turner II*, slip op., p. 20, because of a “trend toward greater horizontal concentration . . . driven by ‘[e]nhanced growth prospects for advertising sales,’” including a trend known as “clustering,” where MSO’s seek control of as many cable systems in a given market as possible. *Turner II*, slip op., p. 19.

The anti-competitive behaviors that motivated Congress to pass a must-carry law, and were cited by the Supreme Court in upholding that law, have been mirrored in MBC’s efforts to obtain access to hundreds of thousands of cable subscribers in the Philadelphia market. One of the three major cable operators in the Philadelphia market, Suburban Cable, has amassed more than 990,000 subscribers in southeastern Pennsylvania, Delaware and New Jersey, plus 160,000 additional subscribers to cable systems operated by Garden State Cablevision, L.P. (“Garden State”), a joint venture between Suburban and Comcast. A Suburban press release has described the acquisition of systems in the Philadelphia market as part of “a strategy to guild a base of contiguous cable customers in the New Jersey, Pennsylvania, and Delaware area,” i.e., clustering. Suburban also launched a “local cable channel providing news, information and entertainment with a focus on . . . the company’s service area in Pennsylvania, New Jersey and Delaware.” Advertising on Suburban’s local channel is handled by Radius Communications, described as “the advertising sales arm of the Lenfest Group,” Suburban’s parent company. Radius Communications sells time not only on Suburban’s “local” channel but on other cable channels and on other cable systems

in the Philadelphia market. As part of its strategy to aggrandize its local channel and build its cable advertising business, Radius Communications, in its sales literature, directly attacked WFMZ-TV in areas where WFMZ-TV was already available on cable systems.⁴

Just as must-carry rules are necessary to ensure that cable operators cannot discriminate against independent and UHF stations, so are they also necessary to certain that the opportunity for these stations to transition to advanced, digital television service is not stifled by anti-competitive barriers to access to millions of cable subscribers. There is no reason to believe that cable operators will have less incentive to discriminate during the transition to digital television than has been demonstrated so far. Indeed, they will have an additional incentive to discriminate: carrying local stations' HDTV signals will require cable operators to either compete for audiences and advertisers against a higher-quality picture or make their own investment in high-definition programming and digital origination and transmission technologies.⁵

In Section 614(b)(4)(B) of the Act, Congress has directed the FCC to preserve competition between local stations and cable operators and to "ensure cable carriage of . . . [advanced television]

⁴ A second part of Suburban's strategy has been to use the regulatory process to prevent WFMZ-TV from gaining access to Suburban's cable subscribers. In a series of orders (*Memorandum Opinion and Order*, DA 97-651, released April 3, 1997; *Memorandum Opinion and Order*, DA 97-817, released April 18, 1997; and *Memorandum Opinion and Order*, DA 97-962, released May 12, 1997), Suburban was ordered to commence carriage of WFMZ-TV on its cable systems in lower Bucks County, Chester County and Delaware County, Pennsylvania, and seven communities in New Jersey within thirty days after MBC installed specialized receiving equipment to assure that a good quality signal from WFMZ-TV would be present at the cable head ends. In the meantime, Suburban filed a Petition for Special Relief asking the FCC to delete the communities in which its systems operate from WFMZ-TV's ADI. This petition was denied, as to the Pennsylvania systems, in a *Memorandum Opinion and Order*, DA 97-1469, released July 14, 1997 (the "Modification Denial Order"). Suburban filed a Petition for Reconsideration of the Modification Denial Order insofar as the FCC had affirmed that the communities in which its Pennsylvania systems operate are part of WFMZ-TV's ADI. That petition is still pending. Even though the FCC never issued a stay of the Modification Denial Order, Suburban has never carried WFMZ-TV in accordance with the must-carry rules on any of those systems. Similarly, Suburban's affiliate company, Garden State, and three Comcast units, also having unsuccessfully sought to have WFMZ-TV's market modified to exclude various New Jersey suburban communities (*Memorandum Opinion and Order*, DA 97-1167; *Memorandum Opinion and Order*, DA 97-1168, and *Memorandum Opinion and Order*, DA 97-1191, all released June 5, 1997), petitioned for reconsideration of those decisions. They too have never carried WFMZ-TV, even though no stay of those orders has been issued.

⁵ One major cable operator, TCI, has announced a third response, anti-competitive in its own right. TCI says it will down-convert 1080i interface ("1080i") HDTV signals to the 480 progressive ("480p") format for retransmission to subscribers, a picture resolution no better than that provided by existing NTSC signals. ("TCI says it will not carry networks' HDTV signals," *New York Times*, May 6, 1998.)

broadcast signals of local television stations" engaged in digital television broadcasting. It also has given the FCC all of the authority it needs to amend its rules to facilitate cable carriage of digital television signals. In fact, other than adoption of technical standards sufficient to preserve the integrity of digital broadcast signals, few if any changes in the must-carry rules are required.

There is, of course, another important objective to be served by adopting must-carry rules for digital television signals. That is to speed and smooth the ultimate transition from NTSC to DTV broadcasting. Where, as in the Philadelphia market, 75 percent of all television households subscribe to cable television, any regulatory scheme that disincentivizes cable television subscribers to purchase digital television receivers will only make the final transition from NTSC to DTV more disruptive. Prices of digital television receivers will remain prohibitively high and HDTV will likely become only a premium service with a limited, elite audience of high-end cable and satellite subscribers.

Of the seven regulatory options posed in the *NPRM* (§§ 39-50), only the first -- immediate application of must-carry to all qualified local digital television signals (*NPRM*, § 41) -- serves both FCC interests in a smooth and speedy transition to digital television broadcasting and preventing cable discrimination against independent and UHF television stations.

The seventh and final proposal -- no must-carry at all, *NPRM*, § 50 -- is clearly unworkable. It will both perpetuate and aggravate the consequences of persistent discrimination against local stations by cable operators, in favor of their own programming and advertising sales divisions. Without assured access to the cable subscribers that represent 75 percent or more of their potential viewers, few television stations -- and even fewer independent and UHF stations -- will be able to justify the millions of dollars necessary to construct DTV facilities and acquire DTV programming. For those stations, there will be no "transition" to digital broadcasting, only a sudden plunge off a precipice.

The five other proposals on which the FCC has solicited comment also suffer from substantial defects that are inimical to the public interest. Some will allow cable operators to discriminate against

independent and smaller stations; some will discourage consumers from purchasing television receivers capable of receiving digital signals. All of them introduce other problems (which are also part and parcel of the "no must-carry" proposal) to the extent they would permit disparate treatment of network and independent stations and disincentivize cable operators to undertake necessary improvements in their systems to accommodate digital signals.

The second proposal -- mandatory carriage of digital signals when cable systems upgrade to a certain minimum capacity (the FCC suggests 120 6 MHZ channels but asks if a lower number of channels, e.g., 54, might be appropriate) (*NPRM*, ¶ 44) -- is illustrative of these shortfalls. Throughout the transition period, cable operators would be permitted to favor their own programming and sales divisions by denying carriage to the independent and small stations with which they compete. Without access to the full-range of digital broadcast television services (including noncommercial educational television stations, which do not have retransmission consent rights), cable subscribers would have less incentive to purchase new, digital television receivers. On the other hand, nothing will prohibit the major television networks and station group owners from utilizing retransmission consent rights for their NTSC signals, or even agreeing to pay money, to secure retransmission consent agreements for their DTV signals and gaining a substantial head start over independent and smaller station competitors. And there will be no regulatory incentive to cable operators to undertake system improvements necessary to provide their subscribers with a greater diversity of services, including HDTV service.

Similarly, the FCC's third proposal -- carriage of a certain number of new digital signals each year until all eligible signals are carried (*NPRM*, ¶ 46) -- permits cable discrimination against the independent stations with which they most closely compete; fails to maximize consumer incentives, at least in the short-term, to purchase digital-capable receivers; and allows network and group-owned stations to use retransmission consent rights to secure a head start over independent and smaller stations and noncommercial educational stations. In addition to the previously enumerated defects (discrimination,

deferred consumer purchases of digital receivers, head start for network and group-owned stations), the FCC's fourth proposal -- carriage of either the analog signal or the digital signal, but not both, until the transition is completed (*NPRM*, ¶ 47) -- negates the whole notion of a transition. It would confront WFMZ-TV and other television stations with a Hobson's choice: (1) continued carriage of the NTSC signal necessary to support DTV facilities and programs to which 75 percent of their potential audience would receive no exposure or (2) delivery of a digital television signal to an audience at least initially too small to support it financially while sacrificing the potential audience of the NTSC signal otherwise capable of sustaining DTV operations.

The FCC's two remaining proposals -- mandatory carriage of digital signals to be deferred until a threshold percentage of consumers have purchased DTV-capable receivers (*NPRM*, ¶ 48) or deferral of mandatory carriage of DTV signals until a fixed date (the FCC suggests May 1, 2002, the deadline for major market independent stations and all stations in markets 31-212 to initiate DTV service) (*NPRM*, ¶ 49) -- are inherently inconsistent with the goal of a rapid transition to digital broadcasting. Under the fifth proposal, cable subscribers, who make up the substantial majority of consumers, will not make the investment in digital receivers necessary to trigger the mandatory carriage without assured access to DTV signals. Under the sixth proposal, cable operators will face no immediate incentive to improve their systems to accommodate digital television signals and, for at least some television stations, the transition period will be effectively halved.

Only the immediate carriage proposal permits television stations -- all television stations -- to realize a return on their federally-mandated investments in digital television transmission and origination equipment and digital-formatted programming, and to reach all of the audience that they have been licensed to serve. Only immediate carriage will provide cable subscribers with the incentive to purchase digital receivers in the near future (and create the volume of sales necessary to bring the price of receivers within the reach of all households). Immediate carriage will also provide an incentive to broadcasters to quickly

commence DTV broadcasts. In a recent statement, Chairman Kennard applauded an announcement that 41 stations will begin digital broadcasts in November:

The fact that so many stations have committed to accelerating their DTV start-up and jumping the gun to bring the benefits of DTV to their communities sooner than required will be remembered as one of the most significant developments in the DTV transition process.

Statement by FCC Chairman William Kennard on Digital Television Transition, October 6, 1998. The most significant step the FCC can yet take to spur the further acceleration of the DTV transition is to mandate immediate carriage of all digital television signals.

In so doing, however, the FCC must assure a relatively even start to the race. In the unusual circumstance where the number of qualified signals exceeds one-third of a cable system's channel capacity, priority should be assigned in the order that stations (1) complete construction of their digital facilities and (2) make their demands for carriage.⁶ Such a priority system will spur all television licensees to construct digital facilities sooner rather than later and in turn lead to the sale of more digital television receivers at lower prices at an earlier date. Of at least equal importance, it will reward and level the playing field for the independent and smaller stations that have less bargaining power relative to cable operators and are most likely to be dependent on the must carry option.

CONCLUSION

To prevent cable operators from discriminating against independent and smaller stations, facilitate a speedy and smooth transition to digital broadcasting, and avoid creating unintended advantages for network and group-owned stations, the FCC should adopt a must-carry rules that entitle all stations to cable carriage upon completion of their digital broadcasting facilities and delivery of a signal carriage request. Any other rule will threaten the viability of independent and smaller stations as they transition to digital

⁶ Because, as the FCC has pointed out, a majority of commercial stations have elected to be carried pursuant to retransmission consent, in which case the signal does not count toward the one-third limit, in most instances the number of NTSC and DTV must-carry signals is likely to be much less than one-third of the channels on the cable system.

broadcasting, perpetuate discrimination against such stations, retard the conversion to digital broadcasting, and confer unwarranted advantages on stations able to use their bargaining power with cable operators to gain a head start over their smaller competitors.

Respectfully submitted,

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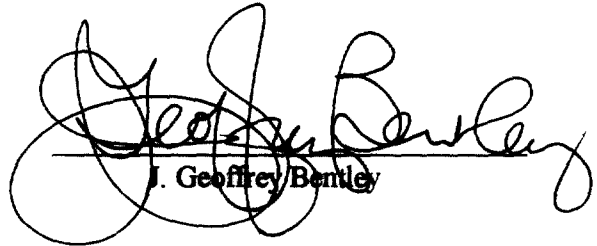
CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Comments of Maranatha Broadcasting Company, Inc., to be served by first-class United States mail, postage prepaid, this 13th day of October 1998, on:

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